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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LOS ALTOS EL GRANADA INVESTORS, Plaintiff and Appellant, v. CITY OF CAPITOLA et al., Defendants and Respondents.	H027860 (Santa Cruz County Super. Ct. No. CV143886) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on May 17, 2006, be modified as follows:

On page 14, footnote 12, line 8, replace the last sentence starting with "At the time Parkowner…" with the following sentence:

At the time Parkowner made the investment, based on Ordinance 626, and at the time of the application, when section 2.18.400 provided, "fair rate of return" "shall be determined with reference to reasonable investment rather than property value," Parkowner should have expected MNOI determination of rent increase applications.

On page 31, third full paragraph, replace the second sentence starting with "the purpose of selecting…" with the following sentence:

"The purpose of selecting a base year is to find a starting point at which the base rent levels reflect general market conditions (*Vega v. City of West Hollywood* (1990) 223 Cal.App.3d 1342, 1351) so as to provide the property owner a fair return and then adjust those rents going forward to maintain that return."

On page 31, third full paragraph, last sentence, in the cite *MHC Operating Limited partnership v. City of San Jose*, add the following point pages 220-221, in between pages 204 and 223.

On page 32, first full paragraph, add the following line to the beginning of the sentence: "Parkowner challenges the Board's conclusion that." The sentence should read:

"Parkowner challenges the Board's conclusion that it had an opportunity in 1987 and in subsequent applications to rebut the presumption that it was receiving a fair return stated in section 2.18.410, but it did not do so." Delete the remainder of the paragraph.

On page 32, after the first full paragraph, remove the next two paragraphs and replace them with the following five paragraphs. Please note the new footnote should be number 16 in the opinion and current footnote 17 ("The citation to Baar's résumé …") will become footnote 17:

Section 2.18.410 states, "[i]t will be presumed that application of this chapter and previous rent review ordinances has resulted in a fair rate of return. A park owner who believes that presumption can be overcome may apply to the city council for determination of the minimum increase necessary to produce a fair rate of return. Any such application must articulate the definition of fair rate of return under which the claim is being made and cite the authority which establishes that the existing return is less than the minimum fair rate of return. The application should also contain all such supporting information as is necessary for an accurate disposition of the application. If the application is successful, rents shall be increased to the minimum amount necessary to produce a fair rate of return."

"A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence." (Evid. Code, § 600, subd. (a).) "A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption." (*Id.*, § 602.) However, in a comment to Evidence Code section 500,

burden of proof, the Law Revision Commission stated, some "so-called presumptions [such as presumption of innocence or of sanity] do not arise from the establishment or proof of a fact in the action. In fact, they are not presumptions at all but are preliminary allocations of the burden of proof in regard to the particular issue. This preliminary allocation of the burden of proof may be satisfied in particular cases by proof of a fact giving rise to a presumption that does affect the burden of proof. For example, the initial burden of proving negligence may be satisfied in a particular case by proof that undamaged goods were delivered to a bailee and that such goods were lost or damaged while in the bailee's possession. Upon such proof, the bailee would have the burden of proof as to his lack of negligence. [Citation.]" (Cal. Law Revision Com. coms., Deering's Ann. Evid. Code (1995 ed.) § 500, pp. 554-555.)

Although called a "presumption," what section 2.18.410 does is preliminarily allocate the burden of proof. Applying Evidence Code section 600 to section 2.18.410, the fact which is to be presumed, that application of the rent control ordinance resulted in a fair rate of return, is not triggered by "another fact . . . established in the action." (Evid. Code, § 600.) What section 2.18.410 does is establish a procedure for a park owner to challenge the current rent rate by requiring the park owner to initiate the process by submitting evidence showing that the current rent does not provide a fair rate of return.

Section 2.18.410 affects the burden of producing evidence because it operates to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied. (Evid. Code, § 603.)[16] "The effect of a

[16] Initially we stated that section 2.18.410 establishes a presumption to implement a public policy other than to facilitate the determination of the particular action in which the presumption is applied (Evid. Code, § 605), namely policies stated by sections 2.18.110, subdivisions A through C, to protect mobile home owners and 2.18.400 to ensure park owners a fair return. In a petition for a rehearing, appellant objected that the presumption as we analyzed it affected the burden of proof and was invalid as stated in *Fisher v. City of Berkeley*, *supra*, 37 Cal.3d 644. On further reflection, we recognize that unlike the extrinsic polices furthered by the ordinance in *Fisher*, the policies of sections (continued)

presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate." (*Id.*, § 604.) In hearing Parkowner's application, Parkowner's evidence prompted the Board to present rebuttal evidence. City determined the issue on the evidence, not on the no-longer operative presumption. It appeared from the record that Parkowner had an opportunity in 1987 and in subsequent applications to rebut the presumption that it was receiving a fair return, and it did so. It received rent increases. What Parkowner apparently did not do was raise the separate issue then whether 1987 should be used as the base year. Since Parkowner did not do so, but accepted the rent increases and applied for subsequent increases based on those numbers, the Board was entitled to rely on the presumption stated in section 2.18.410, "that application of this chapter and previous rent review ordinances has resulted in a fair rate of return."

There is no change in judgment. The petitions for rehearing are denied.

Dated:_____ _____
Premo, J.

WE CONCUR:

_____ _____
Rushing, P.J. Duffy, J.

2.18.110 and 2.18.400 are not implemented by section 2.18.410, other than indirectly by streamlining the procedure for initiating a rent board hearing.